

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---------------------------------|---|------------------------------|
| JOSH L. ANDERSON, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | |
| |) | Civil Action No. 04-135 Erie |
| LARRY E. KOPKO, RANDY J. ICKERT |) | |
| and KATIE L. AVENALI, |) | |
| |) | |
| Defendants |) | Jury Trial Demanded |

DEFENDANT'S POINTS FOR CHARGE

Defendant Katie L. Smith, née Katie L. Avenali, respectfully submits the following Defendant's Points for Charge.

1. The Eighth Amendment to the United States Constitution protects inmates of prisons and jails from cruel and unusual punishment; the use of excessive physical force against an inmate is cruel and unusual punishment in violation of the Eight Amendment constitutional rights of the inmate.

Hudson v. McMillan, 503 U.S. 1, 112 S.Ct. 995, 998-9 (1992).

2. The plaintiff, Josh Anderson, claims that the defendant, Katie Smith, violated his Eighth Amendment right to be free from cruel and unusual punishment by using excessive force against him. You must enter your verdict for the defendant if the plaintiff fails to prove this claim.

West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, 2255 (1988).

3. In order to prove the use of excessive force in violation of the Eighth Amendment the plaintiff, Josh Anderson, must prove by a preponderance of the evidence that the defendant,

Katie Smith, applied force to the plaintiff not in a good faith effort to maintain or restore discipline, but maliciously and sadistically to cause harm.

Hudson v. McMillan, 112 S.Ct. at 999; **West v. Atkins**, 108 S.Ct. at 2255.

4. "Maliciously" means intentionally injuring another without just cause or reason. To act "maliciously" means intentionally performing a wrongful act without just cause or excuse, with an intent to inflict injury or under circumstances that show an evil intent.

3B Kevin F. O'Malley et al., Federal Jury Practice and Instructions §166.31 (5th Ed. 2001).

5. "Sadistically" means engaging in extreme or excessive cruelty or delighting in cruelty.

Howard v. Barnett, 21 F.3d 868, 872 (8th Cir. 1994).

8. If you find that excessive force was used on the plaintiff, Josh Anderson, by the defendant, Katie Smith, and if you find that the plaintiff experienced physical pain and mental suffering as a result of physical injury directly caused by excessive force used by the defendant, then you must award plaintiff such money damages as you find from the preponderance of the evidence will fairly and justly compensate plaintiff for that pain and suffering.

Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 2542-3 (1986); **Fontroy v. Owens**, 150 F.3d 239, 244; **42 U.S.C. §1997e(e)**.

9. If you find that the defendant, Katie Smith, used excessive force on the plaintiff, Josh Anderson, but you find that the plaintiff suffered no physical injury as a direct result of that excessive use of force, then you must return a verdict for plaintiff in the nominal amount of one dollar.

Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000); **Carey v. Phipus**, 435 U.S. 247, 98 S.Ct. 1042, 1053 (1978).

10. If you find that the defendant used excessive force on the plaintiff then, in addition to any other damages to which you find the plaintiff is entitled, you may, but are not required, award plaintiff an additional amount as punitive damages if you find it is appropriate to punish the defendant or deter the defendant and others from similar conduct in the future. For you to award punitive damages, you must find that the conduct of the defendant, Katie Smith, was motivated by evil motive or intent, or it involved reckless or callous indifference to the right of the plaintiff, Josh Anderson, to be free from the use of excessive force in violation of the Eighth Amendment.

Smith v. Wade, 461 U.S. 30, 103 S.Ct. 1625, 1640 (1983).

Respectfully submitted,

/s/ James T. Marnen
James T. Marnen
PA ID No. 15858
KNOX McLAUGHLIN GORNALL &
SENNETT, P.C.
120 West Tenth Street
Erie, PA 16501-1461
General Tel: 814-459-2800
Direct Dial Tel: 814-459-9886, Ext. 203
Fax: 814-453-4530
Email: jmarnen@kmgslaw.com

Attorney for Defendants,
Larry E. Kopko, Randy J. Ickert and
Katie L. Smith, née Katie L. Avenali

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of August, 2006, a copy of the within document was served on all counsel of record and unrepresented parties in accordance with the applicable rules of court.

/s/ James T. Marnen
James T. Marnen

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